

ORIGINAL

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

2011 SEP 21 PM 1:53

THOMAS DENSMORE
3064 Cameo Ln
Dallas, Texas 75234-3608
(214) 789-6305
Plaintiff

DEPUTY CLERK

v.
DOUGLAS H SHULMAN in his capacity
COMMISSIONER OF THE
INTERNAL REVENUE SERVICE.
1111 Constitution Avenue N.W.
Washington, DC 20009
And
NOEL DELGADO in his official capacity
Defendants

Civil Action No. _____

3-11CV2468-N

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

NATURE OF ACTION

1. This is an action under pursuant to Federal Rule of Civil Procedure 65, and 26 U.S.C. §§ 7402, 7407 and 7408, the Plaintiff, Thomas Densmore seeks preliminary injunctive relief against the Defendants, Commissioner of the Internal Revenue and Neol Delgado, both jointly and severally. U.S.C. §§ 26 U.S.C 7213 7213A, 26 U.S.C 7214, 26 U.S.C. §§ 6321, 7431(a)(1), 7433, and 7432 26 U.S.C. § 6103(b)(8), 26 U.S.C. 26 U.S.C. § 6102(b)(7), 26 U.S.C. § 6103(b)(6) 26 U.S.C. § 7214 (a)(1), for declaratory and injunctive relief seeking to compel the Internal Revenue Service Personal to cease from continued harassment and unauthorized collection activities.

2. The Internal Revenue Service filed a lien on the Plaintiff wrongfully. The federal tax lien arises when any "person" liable to pay any federal tax fails to pay the tax after a demand by the Government for payment IRC § 6321. For federal tax law purposes a

“person” is defined to include individuals, trusts, estates, partnerships, associations, companies and corporations. The lien is effective from the date the Government assesses the tax even though the notice and demand for payment ordinarily gives the taxpayer an additional 10 days after assessment to pay the tax. Thus, if the taxpayer neglects or refuses to pay the assessed tax, then the lien is deemed to relate back to the assessment date IRC§ 6322. The Service is not required to file a NFTL (Notice of Federal Tax Lien) in order for the tax lien to attach. IRC§ 6322 also delineates when a Federal Tax Lien should not be filed in the Internal Revenue Manual(IRM 5.12.2.42(2) (A) The taxpayer is a defunct corporation or LLC’s(where the LLC is liable) whose assets have been previously liquidated(B) The taxpayer is deceased and there are no known assets in an estate(C) The taxpayer resided abroad and has no known assets in the United States (3) (A) The taxpayer is a corporate entity or LLC(where the LLC is liable) that has gone through a liquidation bankruptcy or receivership regardless of dollar amount.(B) When a non-paying officer has been assessed the Trust Fund Recovery Penalty (TFRP) and an adjustment to the TFRP is pending because the assessment has been paid by another office.(C) There is an indication that the liability has been satisfied or that credits are available to satisfy the liability,(D) The taxpayer is in bankruptcy and the NFTL relates to liabilities incurred before the taxpayer filed bankruptcy. Section 362(a) of the Bankruptcy Code imposes an automatic stay that prohibits all creditors from taking certain collection actions against the debtors in bankruptcy. Consult Counsel to determine if a NFTL may be filed after the automatic stay ends. (E) There is genuine doubt as to the validity of the liability. But the revenue office must document the taxpayer’s justification and the method of resolution (payment tracer, amended return, credit transfer etc.). In

short,” persons” who are responsible for the payment of withholding taxes are those who “had the final word as to what bill should be paid, and when”. Mr. Densmore does not fit into this category as he had no authority to handle financial affairs and thus is not a “responsible party” within the meaning of 26 U.S.C. § 6672. In furtherance of Mr. Densmore’s argument see *Slodov v United States*, the Supreme Court created an exception to § 6672 liability intended to “encourage new management to salvage failing businesses” without incurring tax liability for back taxes. If such an exception did not exist, “a well counseled person contemplating assuming control of a financial beleaguered corporation owing back employment taxes would recognize that he could do so without incurring personal civil and criminal penalties only if there were available sufficient borrowed or personal funds fully to pay all back employment taxes before doing any business.” Therefore, the Court concluded, when the individual who caused the delinquency in tax payments is also a “responsible party” at the time the government attempts to collect from the employer has failed, § 6672 applies to that individual and not to the new manager.. When, on the other hand, there has been a change in control of the corporation prior to the expirations of the tax quarter, or at a time when tax delinquency for pay quarters already exists, liability may not inure to the new management unless a trust has been impressed under § 7501 prior to the accession of the new” responsible person”. Revenue Officer, Noel Delgado knows or should have known that Mr. Densmore is not liable for employment tax which was stated by the “responsible party” of the defunct corporation, American Medical Staffing Inc. Under 18 U.S.C. § 1030 and 26 USC 7214 which states: (a) *unlawful acts of revenue officers or agents. Any officer or*

employee of the United States acting in connection with any revenue law of the United States-

(1) who is guilty of any extortion or willful oppression under color of law, or

(2) who knowingly demands other or greater sums than authorized by law...

(3) who with intent to defeat the application of any provision of this title fails to perform any of the duties of his office or employment.

“When lawsuits are brought against federal officials, they must be brought against them in their “individual” capacity not their official capacity. When federal officials perpetrate constitutional torts, they do so ultra vires and lose the shield of immunity.”

Williams v U.S. Department of Agriculture, 815 F.2d. 369, ACLU Foundation v. Barr, 952 F.2d. 457, 293 U.S. App.DC 101, (CA DC 1991).

“Personal involvement in deprivation of constitutional rights is prerequisite to award of damages, but defendant may be personally involved in constitutional deprivation by direct participation, failure to remedy wrongs after learning about it, creation of a policy or custom under which unconstitutional practices occur or gross negligence in managing subordinates who cause violations.” (Gallegos v. Haggerty, N.D. of New York, 689 F. Supp. 93 (1988).

“Sovereign immunity does not shield the individual perpetrators in their individual capacity, as opposed to their official, capacities. White v Franklin, 637 F. Supp. 601, 612(N.D. Miss. 1986); Keese v United States, 632 F.Supp.85, 92 (S.D. Texas. 1985). “Williams-on v U.S. Depart of Agriculture, 815 F.2d 368 at 379, (5th Cir. 1987).

4. The plaintiff also brings this action under IRS Misconduct pursuant to 26 U.S.C §7214 (a) (1) (8) and 26 § 1203 (a) () to obtain declaratory and injunctive relief against the IRS agents for violation of civil and constitutional rights. Revenue Officer Noel Delgado knows or should know that Mr. Densmore is under the exception outlined in 26 U.S.C § 7501.

JURISDICTION

5. This Court has jurisdiction under 28 U.S.C. §§§§ 1331, 1340, 1343, and 1345.

6. Venue lies in the United States District Court because the lawsuit concerns a federal question.

PARTIES

7. Plaintiff, Thomas Densmore, is a taxpayer.

8. Defendant, is the Commissioner Internal Revenue Service, is an agency of the United States, and the other defendant is Noel Delgado an employee of Internal Revenue Service.

EXHAUSTION OF ADMINISTRATIVE PROCEDURES

9. Plaintiff timely exhausted administrative remedies, by attending collection conferences and attending Collection Due Process hearing, filing Offer in Compromise, and appealing the decision not once but twice pursuant to section 7430.

FACTUAL BACKGROUND

10. Mr. Densmore the Plaintiff joined American Medical Staffing Inc. for one reason only. The reason was to get some stability back in to the Corporations so that the company could be sold. Mr. Densmore had no signing authority to sign checks, and had no other authority to commit the company to any obligation according to the bylaws Mr. Densmore's only responsibility was to assume the presidency of the company until the sale of the company was completed.

11. On or about December 5, 2006 Gregory N Boyes wrote a letter to Frederick Sleet, tax consultant, explaining Mr. Densmore's responsibility and the fact that Mr. Densmore had no signing authority. However on the Report of Interview with Individual Related to Trust Fund Recovery Penalty the Revenue Officer provided erroneous information not taking into account the facts of Mr. Densmore's involvement with company. If the IRS personnel would have reviewed both documents prepared at the due process hearing they would have noticed that there are additions to the Form 4180 by the interviewer that are not correct. These additions to Form 4180 are in conflict with Gregory N Boyes who was an officer of the company and responsible for Employment Tax, and thus responsible for the Trust Fund Recovery Penalty which he admitted to in the due process meeting. . Mr. Densmore's was only associated with the company for three months, and Mr. Densmore response to the Interview which agrees with the Gregory N Boyes Interview documentation. These documents also stated that Mr. Densmore did not have the authority to sign checks, and according to the IRS Manual Mr. Densmore could not be responsible for any company or employment taxes and therefore could not be subject to the Trust Fund Recovery Penalty.

According to the ISR Rev Manual the questions to be contemplated are as follows:

- Who is responsible for collecting and paying withheld income and employment taxes, or for paying collected excise taxes; and
- Who willfully exists as the responsible person
- Knew about the unpaid taxes; and
- Used the withheld or collected funds to keep the business going, allowed available funds to be paid to other creditors other than the IRS or otherwise failed to pay over the taxes to IRS.

12. Mr. Densmore does not fall under any of the definitions above therefore he is not liable for the Trust Fund Recovery Penalty. Also note that additions have been made to Gregory N Boyes Interview Sheet notes where the Revenue Officer tried to include Mr. Densmore which is fraudulent and Mr. Densmore may have a claim pursuant to 26 U.S.C. § 7433. Once the taxpayer rebuts the presumption, the burden reverts to the IRS to show that its determination was and is correct.

COUNT 1-REQUEST FOR PRELIMINARY INJUNCTION RULE (65)

13. Plaintiff will suffer irreparable injury if defendant is not enjoined during the pendency of this lawsuit from stopping the Defendant from a levying the Plaintiff's bank account, which is used to support him and keep him in good standing with his mortgage so that he will go into foreclosure. If Plaintiff goes into foreclosure he will not be in a position to find a place to live. *Sampson v Murray* 415 U.S. 61, 88-89, 94 S.Ct 937, 952-53(1974); *Hoechst Diafoil Co. v Nan Ya Plastics Corp.*, 174 F.3d 411, 417(4th Cir. 1999)

14. There is a substantial likelihood that Plaintiff will prevail on the merits because the Plaintiff was not responsible for the tax, and therefore is not responsible for the Trust Fund Recovery Penalty, and pursuant to Internal Revenue Code § 6672(a), provides in pertinent part that only a person who has the authority to pay the tax is liable for the Trust Fund Recovery Penalty. (*U.S. V Microsoft Corp. 147 F.3d 935, 943(D.C. Cir. 1998)* DSC *Comm. Corp*

15. Noel Delgado, threatened Plaintiff with a levy after the lien was filed erroneously on Trust Fund Recovery Penalties that the Plaintiff does not owe. This far outweighs the harm a preliminary injunction would inflict on Defendant (*See Hoechst, 174 F.3d at 417; Microsoft, 147 F.3d at 943*).

16. Issuance of a preliminary injunction is not against the public interest because the Plaintiff does not owe the Trust Fund Recovery Penalties. (*Hoechst, 174 F.3d at 417; DSC, 81 F.3d at 600*)

17. Plaintiff asks the court to set his application for preliminary injunction for hearing at the earliest possible time and, after hearing the request issue a preliminary injunction against defendant.

COUNT 2-REQUEST FOR DECLARATORY JUDGMENT

18. Plaintiff brings this claim for a declaratory judgment under Federal Rule of Civil Procedure 57 and 28 U.S.C. §§ 2201, 220.

19. The fact that Plaintiff was subjected to illegal collection practices, intentional and willful harassment, and the recipient of fraudulent documentation to collect a debt to the government that the Plaintiff does not owe by the named revenue officer Noel Delgado.

CAUSE OF ACTION

20. Plaintiff incorporates the allegations set forth in paragraphs 1-19 as if set forth fully herein.

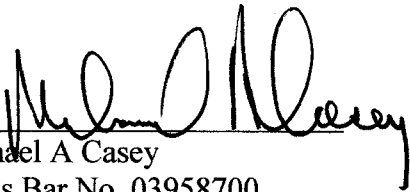
21. Plaintiff has exhausted his administrative remedies with respect to the Collection Due Process Hearings. Defendants have unlawfully violated IRS Rule of Misconduct, and reported fraudulent information on an official document in violation of 18 U.S.C. § 1001.

REQUESTED RELIEF

22. For these reasons, Plaintiffs asks the court for a judgment against defendant for the following:

- a. Declare the Plaintiff owes nothing with respect to the Trust Fund Recovery Penalties.
- b. Stop the IRS from harassing the Plaintiff.
- c. Release the lien filed against Plaintiff.
- d. Provide for expeditious proceedings in this action;
- e. Award Plaintiff his costs and reasonable attorneys fees incurred in this action; d
- g. Return Personal Tax Return Refunds for prior years wrongly withheld:
- h. Prohibit the IRS from Levying on Plaintiff 's bank accounts
- i. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

BY: 
Michael A Casey
Texas Bar No. 03958700
PO Box 2577
Arlington, Texas 76004
Tel. (817) 269-8822
Attorney for Plaintiff
Thomas Densmore

DATE: September 21, 2011

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
THOMAS DENSMORE

(b) County of Residence of First Listed Plaintiff DALLAS
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
MICHAEL CASEY (817) 269-8822
PO Box 2577
Arlington, Texas 76004

DEFENDANTS
Commissioner of the Internal Revenue Service
Noel Delgado

County of Residence of First Listed Defendant Multi County/Dallas
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)
Department of Justice

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWW/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input checked="" type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
26 U.S.C. 7213, 26 U.S.C. 7214, 26 U.S.C. 7431, 26 U.S.C. 7433

Brief description of cause:

Wrongful Collection Action

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) (See instructions)
PENDING OR CLOSED:

JUDGE _____

DOCKET NUMBER _____

DATE _____

SIGNATURE OF ATTORNEY OF RECORD _____

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____